Supreme Court, U.S.
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No. 01-419

In The

Supreme Court of the United States

CITY OF COLUMBUS, *et al.*,

Petitioners,

v.

OURS GARAGE AND WRECKER SERVICE, INC., *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF AMICUS CURIAE MIAMI-DADE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA IN SUPPORT OF PETITIONER CITY OF COLUMBUS

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STATEMENT OF CONSENT

Pursuant to Rule 37.4 of the Rules of this Court, this amicus brief is submitted on behalf of Miami-Dade County, a political subdivision of the State of Florida, and thus no motion for leave to file an *amicus curiae* brief is necessary.

INTEREST OF AMICUS CURIAE[1]

Miami-Dade County is a political subdivision of the State of Florida. Section 11, Article VIII, 1885, of the Florida Constitution vests Miami-Dade County with the power of the Florida Legislature in matters of local concern. On July 11, 1989, the Miami-Dade Board of County Commissioners enacted Article III, Section 30 of the Code of Miami-Dade County, Florida, relating to towing of motor vehicles. This comprehensive ordinance was designed to regulate the towing industry at large, to address towing safety issues and to prohibit abusive practices committed by various towing companies. Pursuant to Section 30-477 of the Code of Miami-Dade County, Florida, the towing of Motor Vehicles Ordinance is enforced by the Miami-Dade Consumer Services Department, the police forces of the various municipalities in Miami-Dade County, and the Miami-Dade Police Department. The Miami-Dade Consumer Services

[1] This brief was authored solely by the Miami-Dade Consumer Advocate, and not authored at all by counsel for a party. The entire expense of printing and serving the brief is to be paid by Miami-Dade County, a political subdivision of the State of Florida.

Department licenses all towing companies that regularly perform towing services within the confines of Miami-Dade County, Florida.

If the Sixth Circuit decision is upheld by this Court, Miami-Dade County, Florida, and all other local governments in the nation, will be precluded from protecting their citizens from the pitfalls endemic to the towing industry, a field full of abuse and exploitation.

This amicus brief is being filed by Leonard Leigh Elias in his capacity as the Miami-Dade Consumer Advocate. The Consumer Advocate is empowered by Section 2-25.2(a) and (b) of the Code of Miami-Dade County, Florida, to represent and protect the public interest in proceedings or hearings of any nature before the courts. Public interest is defined in Section 2-25.3 of the Code of Miami-Dade County, Florida, as an interest or right arising from the Constitution, decisions of courts, common law or other laws, rules and regulations of the United States, or of this State or County, inhering in the citizens of this County or in a broad class of such citizens.

The specific interest of Miami-Dade County, as Amicus Curiae, is to regain its power and authority to regulate towing in Miami-Dade County, Florida. The overall intent of the Miami-Dade Ordinance, in this regard, is expressed in its preamble, which provides that such regulation is appropriate and necessary because:

> . . . numerous persons and firms in Dade County engage in the business of recovering, towing, removing and storing of motor vehicles; and

> . . . such towing services frequently must be provided without the prior consent of the vehicle owner, or under circumstances which prevent negotiating the charges, terms and conditions for the towing service, often resulting in disagreements and complaints between vehicle owners and providers of towing services; and
>
> . . . the vehicles and equipment used to tow vehicles across the thoroughfares of Dade County and the manner in which towing is conducted are of considerable significance to the health, safety and welfare of the owners of towed vehicles and of the residents and visitors in Dade County; and
>
> . . . this Board finds it to be in the best interest of the County, its citizens and its visitors to license and regulate the business of providing such services within Dade County, to assure that all who provide the services are fit and competent to do so and that such services are delivered in a safe and efficient manner.

The Miami-Dade Ordinance, similar to the Columbus Ordinance, addresses a variety of safety and welfare concerns, and implements certain requirements for the towing industry, including inter alia: that principals of the towing company are to undergo a criminal background check, because crime is a real concern in local municipalities; that towing vehicles are to be inspected for equipment to make sure that tows are performed in a safe and efficient manner; that insurance is to be required and verified because of the inherent danger in transporting other vehicles and inevitable accidents resulting therefrom; that standards and procedures are to be established

regulating the towing of cars from private property without the consent of the owner or driver of the vehicle because cars have been held hostage until the consumer paid exorbitant fees in cash; and that predatory practices of roadside solicitors are to be prohibited because stranded motorists are "sitting ducks" for unscrupulous towers.

SUMMARY OF THE ARGUMENT

Towing has never been a federal issue, nor is it generally a state regulated industry. Local governments have traditionally regulated the towing industry due to its complexity and need for close and local enforcement. By holding that local governments are preempted from licensing towing companies, the Sixth Circuit has effectively paralyzed local government's ability to: 1) address towing safety concerns and 2) protect their citizens from abusive towing practices.

For the following reasons, if the Sixth Circuit decision is upheld, no federal, state, or local authority will exist to regulate the towing industry. Historically, the federal government has not and – in all likelihood – will not be a source of regulatory authority for this industry. For their part, states have not regulated this industry because it is a local matter and, invariably, has been left exclusively to local governments. Unfortunately, local governments, the only remaining source of regulatory authority, who have traditionally regulated the towing industry, will be precluded from exercising that regulatory mandate if the Sixth Circuit's decision is upheld.

Inevitably, such a regulatory void will create an atmosphere of anarchy in the towing industry, which cannot be condoned or tolerated by this Court.

As expressed more fully below: (1) Congress lacks the power to preempt local governments from licensing and regulating towing activities; (2) Congress did not clearly and manifestly intend to preempt local government from licensing and regulating towing activities; (3) the Interstate Commerce Act does not prevent states from delegating to local governments the enforcement of the towing industry; and (4) licensing requirements of a towing company do not relate to the motor carrier's "price, route or service."

Thus, Amicus Curiae respectfully requests this Court to reverse the decision of the Sixth Circuit below.

ARGUMENT

A. Congress lacks the power to preempt local governments from licensing and regulating towing activities.

When Title VI of the Federal Aviation Administration Authorization Act of 1994 (Title VI) was enacted, it was unclear whether Congress intended to include intrastate vehicle towing within Title VI's scope. In fact, the genesis of Title VI had nothing to do with towing and the district court in *426 Bloomfield Avenue Corp. v. City of Newark*, 904 F. Supp. 364, 370 (D. N.J. 1995), referred to Title VI as a "linguistic morass." The statute simply stated that a state

or municipality may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of any motor carrier- . . . with respect to the transportation of property. 49 U.S.C. § 14501(c)(1). The genesis of this law stems from the decision of the United States Court of Appeals in *Federal Express Corp. v. California Public Util. Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 504 U.S. 979 (1992), wherein the Ninth Circuit held that Federal Express was an air carrier for purposes of the Airline Deregulation Act of 1978 and, thus, was not subject to California's intrastate economic regulation. Consequently, Federal Express and other deregulated shippers had a competitive benefit over shippers that were not air carriers, but who were governed by state and local economic regulations. See *426 Bloomfield Avenue Corp. v. City of Newark*, 904 F. Supp. 364, 370 (D. N.J. 1995). The intended purpose of Title VI was to "create a less regulated, uniform, market-driven economy for those who buy and sell the transportation services of motor carriage" so as to "even the playing field between air carriers and motor carriers." *Rhode Island Public Towing Ass'n v. State of Rhode Island*, 1997 U.S. Dist. LEXIS 3316, at 21-22 (D. R.I. 1977). In short, Congress intended to preempt state and local regulation of economic aspects of the shipping and trucking industries in an effort to achieve free market competition. Conf. Rep. on H.R. 2739, 140 Cong. Rec. H 7116. In 1995, Congress amended Title VI in the Interstate Commerce Commission Termination Act of 1995, to include an exemption for state and local regulations. The exemption authorizes state and local governments to enact laws relating to the price of for-hire motor vehicle transportation by a tow

truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle. The Sixth Circuit has opined that this dangling exception permits local governments to regulate prices of nonconsensual tows, while leaving undisturbed the preemptive effect of the statute as it pertains to all other aspects of the towing industry.

Amicus Curiae respectfully submits that Congress had no power to usurp the role of local governments in regulating local towing activities. There is a noticeable disparity between air carriers and trucking companies from the towing companies at issue here. Trucking companies operate mainly on an interstate basis and make their livelihood transporting goods between different states. Tow trucks, on the other hand, generally do not operate between states or even between cities for that matter, and are widely used for transportation within a single city or municipality. In fact, Miami-Dade County, Florida, is located about four hundred miles from the border with its closest neighbor, Georgia, thus posing absolutely no threat to interstate commerce. Until the decision of *R. Mayer of Atlanta v. City of Atlanta*, 158 F.3d 538 (11th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999), Miami-Dade County regulated towing activities regularly conducted within its municipal confines. Tow trucks do not, and cannot, exist on an interstate basis and often stay within the highways and streets of one locality. Traffic control and the use of highways is an area that is peculiarly of local concern. The federal government does not regulate towing practices. Thus, there is no conflicting federal regulation in this regard. In *Railway Exp. Agency v.*

People of State of N.Y., 336 U.S. 106, 111, 69 S.Ct. 463, 93 L.Ed. 533 (1949), the Court noted:

> Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce.

In *United States v. Lopez*, 514 U.S. 549 (1995), 115 S.Ct. 1624, 131 L.Ed. 2d 626 (1995), this Court ruled that Congress lacked power under the Commerce Clause to criminalize possession of firearms in school zones. The message signaled in that case is very clear – the federal government is not prepared to address local law enforcement duties. There must be a political accountability, and because the federal government does not, and in all likelihood will not, address local problems relating to the towing industry, there can be no federal accountability. Very simply and succinctly stated, local regulation of towing activities does not substantially affect interstate commerce. Therefore, applying the *Lopez* case to the facts in the case *sub judice*, the congressional action to preempt local governments from licensing and regulating towing companies is violative of the Tenth Amendment and is unconstitutional.

Respondents argue that local regulation of towing businesses is impermissible because it would have an negative effect on interstate commerce; however, the Court in *Maine v. Taylor*, 477 U.S. 131, 151 (1986), stated, "The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values." The same Court maintained

the principle that the State "retains broad regulatory authority to protect the health and safety of its citizens . . . " *Id.* at 151. The inference drawn from these statements is that the Court should value interstate commerce, but not at the expense of the safety of the citizens of a State. Under the interpretation of the Sixth Circuit, the mere business interests of a tower is valued as more important than a consumer's health and safety.

In *People of State of California v. Thompson*, 313 U.S. 109, 112 (1941), a similar Supreme Court case regarding the implications of interstate commerce, the court stated:

> It does not appear that the regulation will operate to increase the cost of the transportation or in respects not already indicated affect interstate commerce. It is not shown to be other than what on its face it appears to be, a measure to safeguard the members of the public desiring to secure transportation by motor vehicle, who are peculiarly unable to protect themselves from fraud and overreaching of those engaged in a business notoriously subject to those abuses.

The same Court stated, "fraudulent or unconscionable conduct of those so engaged which is injurious to their patrons, is peculiarly a subject of local concern and the appropriate subject of local regulations. In every practical sense regulation of such conduct is beyond the effective reach of Congressional action." *Id.* at 115.

B. Congress did not expressly and manifestly intend to preempt local governments from licensing and regulating towing activities.

The Sixth Circuit found that Congress expressly preempted the intrastate towing industry from local regulation through Section 14501(c) of Title VI. However, there is absolutely no precise language in that section that preempts local regulation of towing. If Congress intended the State, and only the State, to regulate towing, there would have been clearer language. Nowhere in Section 14501(c) does it state language "only the State" or "no municipality or local government" or any other absolute phrase to positively prevent a local government from licensing and regulating towing companies. It is axiomatic that express preemption will be found only when the language used by Congress demonstrates clear evidence of its intent. In *California v. Zook*, 336 U.S. 725, 728 (1949), the Court stated that " . . . in a preemption test the fundamental inquiry is whether local legislation will conflict with national policy . . . ; if the activity is of predominantly local interest then state action may be permissible, but if a uniform national rule is necessary then federal preemption will be implied." The federal government does not regulate towers; therefore, no conflict exists.

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), quoting *Rice v. Santa Fe Elevator* Corp., 331 U.S. 218, 230 (1947), the court stated, "the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that [is] the clear and manifest purpose of Congress." Similarly, in *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749 (1942), the court stated, "The intention of Congress to

exclude states from exercising their police power over traditionally local matters, such as public safety and order and the use of streets and highways, must be clearly manifested, and the Supreme Court will not lightly infer that Congress by mere passage of a federal act has impaired traditional sovereignty of the states in that regard."

As stated previously, the intended purpose of Title VI was to "create a less regulated, uniform, market-driven economy for those who buy and sell the transportation services of motor carriage" so as to "even the playing field between air carriers and motor carriers." *Rhode Island Public Towing Ass'n v. State of Rhode Island*, 1997 U.S. Dist. LEXIS 3316, at 21-22. It is obvious that Congress did not clearly and manifestly state that local governments are preempted from regulating the towing industry. In fact, 49 U.S.C. § 13506(b) provides that:

> [e]xcept to the extent the Secretary or Board, as applicable finds it necessary to exercise jurisdiction to carry out the transportation policy of 49 U.S.C. Section 13101, neither the Secretary nor the Board has jurisdiction under this part over –
>
> (1) transportation provided entirely in a municipality . . . [or]
>
> (3) the emergency towing of an accidentally wrecked or disabled motor vehicle.

Clearly, as per § 13506(b), the overwhelming majority of tows take place entirely within a municipality. In addition, Congress made it eminently clear that local governments could regulate emergency towing of accidentally-wrecked or disabled motor vehicles, unless the Secretary or Board found to the contrary. There is absolutely no

evidence in the record below demonstrating that the Secretary or Board found it necessary to exercise jurisdiction to carry out the transportation policy of Section 13101. Rather, the Sixth Circuit usurped the role of the Secretary or Board and made findings that are more properly reserved for the executive branch of government, not the judiciary.

Congress' specific reference to "emergency towing of an accidentally wrecked or disabled motor vehicle" in 49 U.S.C. § 13506(b)(3) clearly and manifestly establishes that local governments are not preempted from licensing and regulating the towing industry. If Congress intended totally to prohibit local governments from licensing and regulating the towing industry, with the exception of preventing price gouging for nonconsensual tows, then Congress should have expressly articulated the preemption with that language. In the absence of clear and manifest language to the contrary, local governments should be able to exercise their police powers to regulate local towing activities.

Numerous other federal decisions have dealt with the issue of federal preemption of local and state regulations, many of those decisions specifically touched on the issue of safety. Since 1997, federal courts in Indiana, *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 153 F.Supp.2d 935 (S.D. Ind.Indianapolis Div. 2001), Illinois, *Caraker v. Sandoz Pharmaceuticals Corp.*, 2001 WL 1190858 (S.D. Ill. 2001), Colorado, *Bioganic Safety Brands, Inc. v. Ament*, 174 F.Supp.2d 1168 (D. Colo. 2001), New York, *Oxygenated Fuels Ass'n, Inc. v. Pataki*, 158 F.Supp.2d 248 (N.D. N.Y. 2001), Iowa, *Wright v. Brooke Group Ltd.*, 114 F.Supp.2d 797 (N.D. Iowa 2000), Ohio, *Kemp v.*

Medtronic, Inc., 231 F.3d 216 (C.A.6 Ohio 2000), Massachusetts, *Somes v. United Airlines, Inc.*, 33 F.Supp.2d 78 (D. Mass. 1999), District of Columbia, *Geier v. American Honda Motor Co., Inc.*, 166 F.3d 1236 (C. A.D.C. 1999), South Carolina, *Casino Ventures v. Stewart*, 183 F.3d 307 (C.A.4 S.C. 1999), Pennsylvania, *Lorincie v. Southeastern Penn. Transp. Authority*, 34 F.Supp.2d 929 (E.D. Pa. 1998), Washington, *Lindsey v. Tacoma-Pierce County Health Dept.*, 8 F.Supp.2d 1213 (W.D. Wash. 1997), California *Law v. General Motors Corp.*, 114 F.3d 908 (C.A.9 Cal. 1997) and Nebraska, *Poole v. Burlington Northern R. Co.*, 987 F.Supp 753 (D. Neb. 1997), have all had safety preemption issues before their respective courts. In each instance, the courts have maintained the principle that "the presumption against federal preemption of state law is even stronger with state or local regulation of matters related to health and safety," *Caraker*, 172 F.Supp.2d at 1032.

Towing, by its very nature, involves safety and welfare issues to the public. The Washington Supreme Court stated in *Crane Towing, Inc. v. Gorton*, 89 Wash.2d. 161, 169-70 (1977), "legislation which tends to assist members of the public from involuntarily losing the use of their vehicles and which tends to expedite recovery of their vehicles once they have been removed fairly and clearly promotes the safety and welfare of the public."

C. The Interstate Commerce Act does not prevent states from delegating enforcement powers to local governments relating to towing activities.

The Second Circuit, *Ace Auto Body & Towing, LTD. v. City of New York*, 171 F.3d 765 (2d Cir. 1999) and California Court of Appeals, *People v. Servantes*, 86 Cal.App.4th 1081 (C.A.5 Cal. 2001) have ruled that local governments throughout the United States should continue to license and regulate towers because 49 U.S.C. § 11501(b)(2)(A), now codified at 49 U.S.C. § 14501(c)(2)(A), provides that the preemption:

> [s]hall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of requirements relating to insurance requirements and self-insurance authorization.

The Sixth Circuit, however, opined that this statutory section is not applicable to local governments in the above mentioned Circuits because State law provisions omit reference to state's political subdivisions. This finding clearly conflicts with this court's ruling in *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 115 L.Ed. 2d 532 (1991), wherein it was held that the failure to include "political subdivisions" when mentioning "states" in an exception to a general rule is insufficient to demonstrate a clear and manifest congressional intent to preempt states from delegating authority to political subdivisions.

States routinely delegate enforcement powers to political subdivisions because local governments are better able to protect public safety on streets and highways. For example, Florida Statute, § 715.07(9)(b) authorizes local government to enact stricter laws and to delegate authority to municipalities. That statute was created because the state recognizes that towing is a local issue and needs to be enforced on a local basis. The preamble to the Miami-Dade Towing of Motor Vehicles Ordinance, stated more fully hereinabove, graphically highlights the significant health, safety, and welfare concerns of the county. Political subdivisions clearly stand in the shoes of the State when it comes to addressing public safety concerns.

Reliance on *Russello v. United States*, 464 U.S. 16 (1983) is misplaced. The *Russello* case dealt with individual civil liberties and a Racketeer Influenced and Corrupt Organizations Act claim; however, the case *sub judice* is a business regulatory matter. The burden of proof in the criminal context is much higher and intended to require a greater amount of proof and strictness on the part of the State. In a civil context, this requisite strictness is not quite as high. The *Russello* court took its position to protect the citizen against the State in order to protect the rights and welfare of the citizen. Under that same standard, the citizen consumer should be protected as adamantly in this case at bar.

Consequently, the Sixth Circuit's interpretation that 49 U.S.C. § 11501(h)(2)(A), now codified at 49 U.S.C. § 14501(c)(2)(A), applies only to states and not political subdivisions, fails to recognize the reality of local government's role in regulating the towing industry. If Section

14501(c)(2)(A) is interpreted to completely bar local governments from enforcing towing laws, then local governments could not enforce any law that would require the tower to: obtain an occupational license; limit the distance that the vehicle can be towed; allow the motorist to inspect the vehicle for damage prior to release of the vehicle; accept an alternative form of payment from the motorist, and not demand that payment be in cash only; or engage in predatory roadside solicitation. Allowing the interpretation of § 14501(c)(2)(A) to place consumers in a dangerous and compromising position, similar to the ones mentioned above, leads to an absurd result.

If local governments are restricted to merely regulating the price of non-consent tows in a vacuum, then local government will not be able to address towing safety issues and protect their citizens from abusive towing practices. Undoubtedly, this interpretation leads to an absurd result because it permits towers to engage in abusive practices with impunity. This Court should not condone this absurd result.

D. Licensing requirements of a towing company do not relate to the motor carrier's "price, route or service."

Respondents argue and the Sixth Circuit noted that because the towing company did not have a license, its route was adversely affected. Quite to the contrary, however, it is respectfully submitted that the "route" and "service" restrictions would only apply if local governments restrict the actual route of a tower or limit the type

of service the tower can perform. In fact, local governments do not set such restrictions and licensure is not based on "route" or "service."

If local governments are not able to license towers, citizens will be adversely affected in many ways, for instance: 1) criminal background checks on the principals of a towing company will not be performed; 2) the public will not be protected from potential thefts of motor vehicles and personal property therein; and 3) there will be no governmental entity to ensure that tow trucks, dangerous instrumentalities by their own very nature, meet minimum safety and equipment requirements and are insured. If the Sixth Circuit decision is not reversed, a tower with a criminal background and no licensure will be able to offer his towing services to a stranded motorist and, upon consent, tow and remove the motorist's vehicle with an uninsured jalopy pick-up truck that does not meet minimum weight requirements.

The business of towing is a privilege and not a right, and maintaining the minimum standard of safety and welfare to consumers, who are often helpless and put in compromising positions, should be a requirement. A tower must be required to maintain certain standards to own and operate a towing business; however, once those minimum standards are met, local ordinances do not regulate the routes taken or the services allowed.

Clearly, licensing of towers serves a vital public interest, an interest that localities and municipalities must be able to regulate. The breadth of the Sixth Circuit's opinion is overreaching, and creates an immediate chilling

effect on the obligation of local governments to protect their citizens.

CONCLUSION

For the foregoing reasons, the Amicus Curiae respectfully requests the Court to reverse the decision of the court below.

Respectfully submitted,

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